Supreme Court, U.S.
FILED

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No. _____

In The

# Supreme Court of the United States

JEROME ZAMOS,

*Petitioner,*

vs.

COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE,

*Respondent.*

PATRICIA KAY ZAMOS,

*Real Party in Interest.*

**On Petition For A Writ Of Certiorari**
**To The Supreme Court Of The State Of California**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does a state appellate court's refusal to restore an appellant to benefits lost as a result of his or her failure to comply with a lower court order which has been reversed on appeal [and thereby rendered void under state law] deny the aggrieved appellant equal protection under the Fourteenth Amendment to the Constitution of the United States?

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## PETITION FOR WRIT OF CERTIORARI[1]

COMES NOW PETITIONER JEROME ZAMOS [hereinafter "PETITIONER"] and prays that a Writ of Certiorari be issued pursuant to Rule 10(c) of the Rules of the Supreme Court of the United States to the California Court of Appeal for the Fourth Appellate District, Division 1 [hereinafter "THE COURT OF APPEAL"] and the Superior Court of the State of California for the County of San Diego [hereinafter "THE FAMILY LAW COURT"] reviewing the California Supreme Court's order entered on January 16, 2002 [APPENDIX "D" at APP. page 8] denying PETITIONER'S petition for a writ of mandate [APPENDIX "F" at APP. pages 13 through 23 inclusive] directing THE COURT OF APPEAL to vacate its previous order of February 21, 2001 [APPENDIX "A" at APP. pages 1 through 2 inclusive] dismissing his appeal from an order entered in THE FAMILY LAW COURT on June 27, 2000 [ which is hereinafter referred to as "THE JUNE 2000 ORDER"] based solely and exclusively upon PETITIONER'S alleged default under the terms of an order entered on December 14, 2000 which was reversed as more fully set forth in the decision found in APPENDIX "B" to this petition [APP. pages 3 through 6 inclusive].

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[1] All parties to these proceedings are listed in the caption of the case as required under Rule 24 1.(b) of the Rules of the Supreme Court of the United States.

## CONSTITUTIONAL AND STATUTORY PROVISIONS[2]

The issues discussed in this PETITION arise under the following laws, statutes, and constitutional provisions:

*THE CONSTITUTION OF THE UNITED STATES OF AMERICA*

Section 1 of the Fourteenth Amendment to the Constitution of the United States of America

*CALIFORNIA CODES & STATUTES*

California Code of Civil Procedure

§§ 902 and 908

## PETITIONER'S EXHAUSTION OF HIS STATE COURT REMEDIES WHICH SUPPORT THIS COURT'S JURISDICTION UNDER 28 U.S.C. § 1257(a)

On October 4, 2001 [following the denial of PETITIONER'S petition in proceeding 01-12 (hereinafter "PROCEEDING 01-12")] THE COURT OF APPEAL reversed an order [hereinafter "THE ATTORNEY FEE ORDER" (see APPENDIX "B" at APP. pages 3 through 6 inclusive)] which had ordered PETITIONER to pay seventy-five hundred dollars [$7,500.00] to his former wife [REAL PARTY IN INTEREST PATRICIA KAY ZAMOS (hereinafter referred to as "REAL PARTY")] in connection with the appeal which was the subject matter of PROCEEDING 01-12 [See: APPENDIX "A" at APP. pages 1 through 2 inclusive].

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[2] The constitutional and statutory provisions referred to in this PETITION are set out in full in APPENDIX "E" at APP. 9 through 12 inclusive.

As set forth in the petition in PROCEEDING 01-12, THE COURT OF APPEAL had previously dismissed PETITIONER'S appeal from a decision entered in THE FAMILY LAW COURT on June 27, 2000 [hereinafter "THE JUNE ORDER"] based solely on his alleged default under THE ATTORNEY FEE ORDER [see APPENDIX "A" at APP. pages 1 through 2 inclusive].

Following the reversal of THE ATTORNEY FEE ORDER PETITIONER [see PROCEEDING 01-12] filed an application for relief with THE COURT OF APPEAL under California Code of Civil Procedure § 908 which was denied on December 3, [see APPENDIX "C" at APP. page 7].

PETITIONER thereafter filed a PETITION FOR WRIT OF MANDATE with the California Supreme Court [see APPENDIX F at APP. pages 13 through 23 inclusive] under which he sought an order which would have required THE COURT OF APPEAL to grant him the relief provided for under California Code of Civil Procedure § 908.

On January 16, 2002 the California Supreme Court denied PETITIONER'S PETITION FOR WRIT OF MANDATE [see APPENDIX "D" at APP. page 8].

There are no further procedures available under California law for reviewing THE COURT OF APPEAL'S denial of relief under California Code of Civil Procedure § 908 or the California Supreme Court's denial of mandate on January 16, 2002.

Based upon the foregoing PETITIONER has no further remedies under California law to obtain relief from

the THE COURT OF APPEAL'S denial of relief from its earlier dismissal of PETITIONER'S appeal from the JUNE 2000 ORDER and is entitled to invoke this Court's jurisdiction under 28 U.S.C. § 1257(a).

## JURISDICTIONAL BASIS FOR PETITION

This petition has been brought to review the decisions of the State Courts of California which PETITIONER alleges have violated his rights under section one of the Fourteenth Amendment to the Constitution of the United States of America which prohibits a state from making or enforcing:

> . . . [A]ny law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.* [emphasis added].

This Petition is filed on the grounds that THE COURT OF APPEAL'S refusal to reinstate PETITIONER'S APPEAL from THE JUNE 2000 ORDER upon reversal of THE ATTORNEY FEE ORDER denied PETITIONER the full protection of state law [ particularly the provisions of California Code of Civil Procedure §§ 902 and 908] by rendering his right to appeal illusory and thereby violated the due process and equal protection clause of the Fourteenth Amendment to the Constitution of the United States of America.

Because the California Supreme Court has now denied PETITIONER'S PETITION FOR REVIEW and

refused to order THE COURT OF APPEAL to reinstate his appeal from THE JUNE 2000 ORDER all orders which are the subject matter of this PETITION are final under state law and no longer subject to further review or correction in state tribunal.

Based upon the foregoing this Court has jurisdiction under 28 U.S.C. § 1257(a) to review the two orders of the state courts of California which are the subject matter of this PETITION.

## THE RIGHTS PETITIONER WAS DENIED IN VIOLATION OF SECTION ONE OF THE FOURTEENTH AMENDMENT

Section One of the Fourteenth Amendment to the Constitution of the United States of America provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws* (emphasis added).

California's legislature provided in California Code of Civil Procedure § 902 that : "Any party aggrieved may appeal . . . "

Because Code of Civil Procedure § 902 is a remedial statute it is supposed to be liberally construed, with any doubts resolved in favor of the right to appeal". However, THE COURT OF APPEAL'S refusal to exercise its

jurisdiction under Code of Civil Procedure § 908 has had just the opposite effect. Instead of giving PETITIONER the benefit he should have realized upon the reversal of THE ATTORNEY FEE ORDER THE COURT OF APPEAL has elected to continue the deprivation of his rights under THE JUNE 2000 ORDER.

> See: *Ajida Technologies, Inc.* v. *Roos Instruments, Inc.*, 87 Cal.App.4th 534, 540 (2001); Eisenberg, Horvitz, and Wiener Cal. Prac. Guide Civ. App. & Writs Ch. 2-D Standing to Appeal ¶ 2:283a [The Rutter Group 2001]

While all this may seem justified in terms of judicial economy and clearing THE COURT OF APPEAL'S busy appellate calender, it can not be justified under the equal protection provisions of the Fourteenth Amendment.

## FACTUAL BACKGROUND OF PETITIONER'S REQUEST FOR RELIEF UNDER CALIFORNIA'S CODE OF CIVIL PROCEDURE § 908

On February 21, 2001 THE COURT OF APPEAL dismissed PETITIONER'S perfected appeal from an order entered in THE FAMILY LAW COURT on June 27, 2000.

As of this date PETITIONER has been denied the appellate rights afforded to *every other party who is an aggrieved party* under California's Code of Civil Procedure § 902. And the denial of PETITIONER'S rights under California Code of Civil Procedure § 902 based solely and exclusively upon his alleged default under THE ATTORNEY FEE ORDER [which has now been invalidated by

THE COURT OF APPEAL] amounts to a penalty for his non-compliance with an unenforceable order.

The essential facts relating to the dismissal of PETITIONER'S fully perfected appeal are set forth in PETITIONER'S earlier petition and appendixes filed in PROCEEDING NO. 01-12.

## FACTUAL BACKGROUND OF ORDER DISMISSING PETITIONER'S APPEAL FROM THE JUNE 2000 ORDER WITHOUT A DECISION ON THE MERITS

The factual basis for the dismissal of PETITIONER'S appeal from THE JUNE 2000 ORDER is set forth in PETITIONER'S earlier petition filed in PROCEEDING 01-12.

As set forth in the petition filed in PROCEEDING 01-12 PETITIONER'S rights to a full review of THE JUNE 2000 ORDER was denied, and his appeal which he was pursuing based upon his rights under Code of Civil Procedure § 902 was dismissed by THE COURT OF APPEAL on February 21, 2000 solely as a result of his alleged default under THE ATTORNEY FEE order which was reversed [in full] on October 4, 2001 [see APPENDIX "A" at page 1].

Under the equal protection clause found in section one of the Fourteenth Amendment to the Constitution of the United States PETITIONER has a right to the full protection of the California appellate process to the extent he falls within the class of persons covered by California Code of Civil Procedure § 902. That class

includes all persons aggrieved by an order or judgment entered in a California court.

## THE DENIAL OF CERTIORARI IN PROCEEDING 01-12

PETITIONER filed a PETITION for Writ of Certiorari following the denial of his PETITION for Review from the Court of Appeal's February 21, 2001 dismissal of his appeal from THE JUNE 2000 ORDER.

In his initial PETITION in PROCEEDING 01-12 PETITIONER argued that his rights under the due process and equal protection clause of the Constitution of the United States of America had been violated as a result of THE COURT OF APPEAL'S use of the dismissal to enforce the provisions of THE ATTORNEY FEE ORDER [which was reversed on October 4, 2001].

On October 1, 2001 this Court denied certiorari in PROCEEDING 01-12.

## PETITIONER'S LEGAL ARGUMENT

### INTRODUCTION

The issue raised by this petition involves a fundamental question of whether an appellant can be deprived of the remedy which he or she [as an aggrieved party under California Code of Civil Procedure § 902] is entitled when he or she exercises his or her right to appeal from an order or judgment entered in a California Court.

Under well established principles of equity [as set forth in RESTATEMENT of Restitutions § 74 (American Law Institute 1937)] an appellate court [whether in California or any other state] returns an appellant to the *status quo* that existed before the entry of a judgment which has been reversed on appeal [regardless of the reason for the reversal]. There are no equitable issues presented under the facts giving rise to this petition which makes that right unavailable to PETITIONER herein.

By contrast the denial of the rights set forth in RESTATEMENT of Restitutions § 74 following an appellate court's reversal of a judgment [regardless of the basis for the reversal] renders the right of appeal illusory and violates [at a minimum] the equal protection clause found in section one of the Fourteenth Amendment to the Constitution of the United States.

As the ultimate guardian of the nation's judicial system's integrity [in both state and federal courts] under sections 1 and 2 of Article III of the Constitution of the United States this Court is charged with the responsibility for assuring the fundamental fairness of the system under the Fourteenth Amendment.

Because PETITIONER'S fundamental rights under the equal protection clause found in section one of the Fourteenth Amendment has been compromised by THE COURT OF APPEAL'S breach in this case, certiorari is appropriate and should be granted.

## I.

## A STATE APPELLATE COURT VIOLATES AN APPELLANT'S RIGHTS UNDER THE EQUAL PROTECTION CLAUSE FOUND IN THE FOURTEENTH AMENDMENT BY REFUSING TO RESTORE ALL BENEFITS LOST AS A RESULT OF THE ENFORCEMENT OF A JUDGMENT OR ORDER THAT HAS BEEN REVERSED

When THE COURT OF APPEAL reversed THE ATTORNEY FEE ORDER on October 4, 2001 [APP. "B" at pages APP. 3 through 6 inclusive] the effect was the same as if the order had never been entered [regardless of the basis upon which the reversal was granted].

See: *Weisenburg* v. *Cragholm*, 5 Cal.3d 892, 896 (1971), *Hall* v. *Superior Court*, 45 Cal.2d 377, 381 (1955), *Barnes* v. *Litton Systems, Inc.*, 28 Cal.App.4th 681, 683-684 (1994)

Because the order upon which THE COURT OF APPEAL based its February 21, 2001 dismissal order is now void, whether the decision to dismiss the PETITIONER'S primary appeal when it still existed was appropriate is irrelevant. Stated in its simplest terms: PETITIONER'S current request for relief [which is the subject matter of this petition] cannot be based upon his failure to comply with a lower court order that no longer exists.

In the absence of some equitable basis for the relief requested following the reversal of THE ATTORNEY FEE ORDER, under the equal protection clause of the Fourteenth Amendment PETITIONER has the right to be restored to all benefits he lost as a result of that order. It is a long-standing legal principle that:

> "[a] person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable. . . . "

*See:* *Atlantic Coast Line R.R.* v. *Florida*, 295 U.S. 301, 309, 55 S.Ct. 713, 716, 79 L.Ed. 1451 (1935); *Mohamed* v. *Kerr*, 91 F.3d 1124, 1126 (8th Cir. 1996); RESTATEMENT of Restitutions § 74 (American Law Institute 1937); RESTATEMENT 3rd Restitutions §§ 17 & 18 (Tent. Draft American Law Institute 2001).

In *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 145-46, 39 S.Ct. 237, 242, 63 L.Ed. 517 (1919) this Court held a claim for restitution is allowable upon:

> [T]he principle, long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby. *This right, so well founded in equity, has been recognized in the practice of the courts of common law from an early period.* Where plaintiff had judgment and execution, and defendant afterwards sued out a writ of error, *it was regularly a part of a judgment of reversal that the plaintiff in error 'be restored to all things which he hath lost by occasion of the said judgment'; and thereupon, in a plain case, a writ of restitution issued at once.* . . . (italics added for emphasis).

It is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject-

matter and of the parties, to correct that which has been wrongfully done by virtue of its process.

*See:* Arkadelphia Milling Co. v. *St. Louis, etc., Ry. Co., supra.*

The point is illustrated by the California Supreme Court's decision in *Schubert* v. *Bates,* 30 Cal. 2d 785 (1947). In *Schubert* v. *Bates, supra,* the California Supreme Court upheld a restitution order entered in a lower court following the reversal of an unlawful detainer action.

In upholding the restitution order the California Supreme Court held at 30 Cal. 2d 789:

> . . . the power of a court whose order or judgment has been reversed to order restoration after reversal is inherent in that court. (citations omitted) Thus, that power of the court and the right of the party prevailing on the appeal to have it exercised exists independently of the request for its exercise.

In reaching its decision the California Supreme Court relied upon the same section of the RESTATEMENT which both this and other federal courts have relied upon in addressing the issue raised by this petition. Quoting from § 74 of the RESTATEMENT of Restitutions, *supra,* the California Supreme Court observed:

> A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final; if the judgment is modified, there is a right to restitution of the excess.

There would be nothing inequitable about the restoration of PETITIONER'S appellate rights in this case, because it is a right that should be "liberally construed" in view of the clear intent of California's Code of Civil Procedure § 902. Therefore the only inequity occurs when PETITIONER is denied a right [without a decision on the merits] which every party aggrieved by a judgment or order is entitled under California law.

Although the California Code of Civil Procedure § 908 [granting THE COURT OF APPEAL jurisdiction to grant the relief sought by this petition] does not speak in absolute terms, reported decisions have consistently held the power to order restitution must not be withheld in an arbitrary manner. Thus in *Holmes* v. *Williams*, 127 Cal.App.2d 377 held at 127 Cal.App.2d 379 (1954):

> . . . the "discretionary" element mentioned is a sound discretion controlled by equitable principles, essentially the same concept as that expressed in different words in section 74 of the RESTATEMENT; i.e., a right to restitution if the judgment is reversed or set aside "unless restitution would be inequitable. . . .

THE COURT OF APPEAL'S glib justification for denying PETITIONER'S REINSTATEMENT MOTION that its initial order dismissing PETITIONER'S appeal was "properly dismissed" [APPENDIX "B" at APP. 3 through 6 inclusive] merely serves to highlight the denial of equal protection which has occurred in this case.

The issue is no longer whether the dismissal of PETITIONER'S appeal was proper based upon the ATTORNEY FEE ORDER that existed on February 21, 2001. The issue is whether the dismissal would have occurred on

February 21, 2001 if THE ATTORNEY FEE order had not been entered in the FAMILY LAW COURT at all.

Since the sole basis for the dismissal of PETITIONER'S appeal was PETITIONER'S failure to comply with an order which no longer exists, THE COURT OF APPEAL'S failure to reinstate PETITIONER'S appeal from THE JUNE 2000 ORDER was a denial of PETITIONER'S rights under federal law and warrants this court's intervention because under clearly established principles of equity [under both California, federal and common law] he was entitled to the restoration of the appellate rights he was denied.

*See:* Code of Civil Procedure § 908.

## II.

## THE DENIAL OF PETITIONER'S REQUEST FOR RELIEF FROM THE EFFECTS OF AN ORDER WHICH HAS BEEN REVERSED ON APPEAL [REGARDLESS OF THE REASONS FOR THE REVERSAL] RENDERS HIS RIGHTS TO AN APPEAL UNDER CALIFORNIA LAW ILLUSORY

What is the benefit of an appeal if the appellant receives no benefit from the process?

That is exactly where THE COURT OF APPEAL'S actions in connection with PETITIONER'S appeal from THE ATTORNEY FEE ORDER has left PETITIONER. Regardless of how either THE COURT OF APPEAL or this Court handled PETITIONER'S appeal from THE JUNE 2000 ORDER upon his alleged default under the terms of the ATTORNEY FEE ORDER, PETITIONER [as "aggrieved party" under Code of Civil Procedure § 902]

should have had the right to challenge it through the state's appellate process.

When PETITIONER perfected his appeal from THE ATTORNEY FEE ORDER he had the right, under the equal protection clause found in the Fourteenth Amendment to the Constitution of the United States to anticipate that if that order was reversed [regardless of the basis for the reversal] he would be placed in the same position he would have been in had the order never been entered in the first place.

The failure of THE COURT OF APPEAL to grant PETITIONER whatever relief was required to accomplish that objective rendered the appellate process granted to him by the legislature of the state of California illusory. And that fact, standing by itself, demonstrates the violation of PETITIONER'S rights under the Fourteenth Amendment of the Constitution of the United States which warrants this court's intervention.

## CONCLUSION

If the right to appeal granted by a state to litigants who enter its courts is to have any legitimacy, then the benefits which an aggrieved party is granted when the process is complete must have some value. By denying PETITIONER [as an aggrieved party pursuing his rights under Code of Civil Procedure § 902] the benefits he had a right to anticipate when he filed his notice of appeal from THE ATTORNEY FEE ORDER in full compliance with California law, THE COURT OF APPEAL denied him the full protection of California's appellate process

and violated his rights under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

LAW OFFICES OF:
JEROME ZAMOS

JEROME ZAMOS
*Petitioner Pro Se*

**APPENDIX "A"**

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

| | | |
|---|---|---|
| In re the Marriage of JEROME and PATRICIA K. ZAMOS, | ) | |
| | ) | D036239 |
| JEROME ZAMOS, | ) | |
| Appellant, | ) | (Super. Ct. No. D270609) |
| v. | ) | |
| PATRICIA K. ZAMOS, | ) | (Filed Feb. 21, 2001) |
| Respondent. | ) | |

THE COURT:

On July 19, 2000, Jerome Zamos filed a notice of appeal seeking review of the June 27, 2000, judgment determining support arrearages. He filed his opening brief on October 10, 2000. On December 14, 2000, the superior court ordered Jerome Zamos to pay $7,500 forthwith to Patricia Zamos for her fees and costs to respond to Jerome Zamos's appeal under Family Code sections 3557 and 2030. Jerome Zamos filed a notice of appeal seeking review of that order. (D037299.)

On December 20, 2000, Patricia Zamos moved to stay the appeal in D036239 until Jerome Zamos paid the $7,500. On January 8, 2001, Jerome Zamos filed an opposition to the request for stay of the appeal. On January 8,

2001, this court issued an order staying the appeal for 30 days. The order further provided: "On or before February 7, 2001, appellant is directed to provide the court with proof of payment of $7,500, to respondent for attorney fees or with a showing of why the appeal should not be dismissed." On February 6, 2001, Jerome Zamos filed a "Response to the order to show cause; request for oral arguments and written opinion pursuant to Article VI § 14 of the Constitution of the State of California and Rule 21(a) of the California Rules of Court and request to vacate stay and reinstate the briefing schedule on pending appeal pursuant to Code of Civil Procedure § 473." Jerome Zamos concedes he has not made the $7,500 payment.

The January 8, 2001, order of this court was not an order to show cause. Rather, the order provided Jerome Zamos with time and opportunity to demonstrate his compliance with the superior court's order, or to oppose dismissal of his appeal on this court's motion. Motions in a reviewing court "may be disposed of after opposition thereto has been filed or the time for filing such opposition has expired. Upon request of a party or upon its own motion, the reviewing court may place any motion on the calendar for hearing or the court may otherwise dispose of the motion as it may determine." (Cal. Rules of Court, rule 41(b).) This court denies Jerome Zamos's request to place the motion on calendar.

The appeal (D036239) is dismissed.

/s/ Kremer
KREMER, P.J.

Copies to: All parties

**APPENDIX "B"**

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

| | |
|---|---|
| In re the Marriage of JEROME and PATRICIA KAY ZAMOS. | |
| JEROME ZAMOS,<br>Appellant,<br>v.<br>PATRICIA KAY ZAMOS,<br>Respondent. | D037299<br>(Super. Ct. No. D270609)<br>(Filed Oct. 4, 2001) |

APPEAL from an order of the Superior Court of San Diego County, Thomas Ashworth III, Judge. Reversed.

Appellant Jerome Zamos (Jerome) was ordered to pay $7,500 to respondent Patricia Zamos (Patricia) as an initial contribution toward defraying the legal fees and costs Patricia would incur in responding to an appeal by Jerome of an earlier order concerning spousal support arrearages (the support appeal). In the current appeal (the attorney fees appeal) Jerome argues that ordering him to contribute funds to defray Patricia's attorney fees in the support appeal was an abuse of discretion.

However, on February 21, 2001, this court dismissed the support appeal. (*Zamos v. Zamos* (Feb. 21, 2001, D036239 [nonpub. order].) All avenues of review of the

dismissal of Jerome's support appeal have now been exhausted,[1] and the order dismissing the support appeal is therefore final. The parties raise no argument suggesting, and we do not perceive, that the attorney fees appeal has any vitality after the dismissal of the support appeal, to which the attorney fee order was ancillary, became final.[2] It is a familiar principle of appellate jurisprudence that we should decide actual controversies and not give opinions on moot questions or academic propositions. (*Bell v. Board of Supervisors* (1976) 55 Cal.App.3d 629, 636-637; *City of Los Angeles v. County of Los Angeles* (1983) 147 Cal.App.3d 952, 958-959.) The attorney fees order required Jerome to contribute funds to Patricia to help fund her opposition to the support appeal; the support appeal was dismissed and therefore any ruling by this court on the propriety of ordering Jerome to contribute money to fund Patricia's opposition to the support appeal is academic.

---

[1] The California Supreme Court denied Jerome's petition for review on May 16, 2001. (*Zamos v. Zamos* (May 16, 2001, S096292).) Jerome's petition for certiorari to the United States Supreme Court was denied on October 1, 2001.

[2] To the contrary, the parties apparently recognize that dismissal of the support appeal moots the order requiring Jerome to make an initial contribution to Patricia's attorney fees incurred to respond to that support appeal. Their only contention is that the appeal of the ancillary attorney fees order is not moot because Jerome's support appeal remains viable until all avenues for appellate review of the support order are exhausted. They raise no argument that the attorney fees appeal retains significance after dismissal of the support appeal became final.

When an appeal has become moot because any appellate ruling would have no practical impact, the court ordinarily will dismiss the appeal. (*Woodward Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888.) However, in some moot actions an appellate court will order the judgment or trial court order reversed and remanded for the limited purpose of instructing the trial court to vacate its underlying order. (Cf. *Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 134-135.) The rationale for employing the latter approach is that a simple dismissal of the appeal leaves the underlying order intact and the appellate court, not having reached the merits of the controversy, did not intend either expressly or by implication to express approval of the ruling. Therefore, to avoid implications that may be inconsistent with the intent of the court, cases like *Paul* reversed for the limited purpose of remanding to the trial court with instructions to vacate the order and dismiss the underlying motion as moot. (*Ibid.*)

Here, dismissal of this appeal would effectively leave intact the order that Jerome pay Patricia $7,500 to resist the support appeal. Because the purpose for that payment – interim funding for Patricia's appellate defense of the support order – has been eliminated, the December 14, 2000, order requiring that interim funding should be vacated. However, vacating the December 14, 2000, order is without prejudice to any application Patricia might make for attorney fees actually incurred in connection with the support appeal.

## DISPOSITION

The December 14, 2000, order is reversed and remanded with directions to deny the motion without prejudice to any future application by Patricia for attorney fees actually incurred in connection with the support appeal. The parties shall bear their own costs on this appeal.

/s/ McDonald
McDONALD, Acting P.J.

WE CONCUR:

/s/ McIntyre
McINTYRE, J.

/s/ O'Rourke
O'ROURKE, J.

**APPENDIX "C"**

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of JEROME and PATRICIA K. ZAMOS,
JEROME ZAMOS,
Appellant,

(Filed Dec. 3, 2001)

v.

PATRICIA K. ZAMOS,
Respondent.

D036239
San Diego County No. D270609

THE COURT:

Appellant's motion to reinstate the appeal is DENIED as it was properly dismissed.

/s/ Benke
Acting Presiding Justice

cc: All Parties

**APPENDIX "D"**

S102837

**IN THE SUPREME COURT OF CALIFORNIA**

En Banc

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JEROME ZAMOS, Petitioner,

v.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE,
Respondent;

PATRICIA KAY ZAMOS, Real Party in Interest.

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Petition for writ of mandate DENIED.

(Filed Jan. 16, 2002)

/s/ George
Chief Justice

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## APPENDIX "E"

## THE CONSTITUTION OF THE UNITED STATES OF AMERICA

### Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Section 1 of the Fourteenth Amendment to the Constitution of the United States of America

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

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## THE UNITED STATES CODE

28 U.S.C. § 1257(a)

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

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## CALIFORNIA CODES & STATUTES

California Code of Civil Procedure

§ 902

Any party aggrieved may appeal in the cases prescribed in this title. A party appealing is known as an appellant, and an adverse party as a respondent.

§ 908

When the judgment or order is reversed or modified, the reviewing court may direct that the parties be returned so far as possible to the positions they occupied before the

enforcement of or execution on the judgment or order. In doing so, the reviewing court may order restitution on reasonable terms and conditions of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with rights of third parties and may direct the entry of a money judgment sufficient to compensate for property or rights not restored. The reviewing court may take evidence and make findings concerning such matters or may, by order, refer such matters to the trial court for determination.

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## RULES OF COURT

## SUPREME COURT RULES

### Rule 10(c)

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court

### Rule 24 1.(b)

1. A brief on the merits for a petitioner or an appellant shall comply in all respects with Rules 33.1 and 34 and shall contain in the order here indicated:

(b) A list of all parties to the proceeding in the court whose judgment is under review (unless the caption of the case in this Court contains the names of all parties).

## APPENDIX "F"

**4 Civ. D036239**
[RELATED SUPREME CT. FILING-S096292]

**[related to 4 Civ. D036392]**
**[related to 4 Civ. D036781]**
**[related to 4 Civ. D037299]**
**[related to 4 Civ. D038380]**

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JEROME ZAMOS,
PETITIONER/APPELLANT,
vs.
THE COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT, Division One;
RESPONDENT.
PATRICIA KAY ZAMOS,
REAL PARTY INTEREST/ APPELLEE/RESPONDENT.

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PETITION FOR WRIT OF MANDATE OR IN THE ALTERNATIVE WRIT OF REVIEW BASED UPON THE REVERSAL OF THE ORDER ENTERED ON DECEMBER 14, 2000 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

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ON APPEAL FROM

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO
The Hon. FEDERICO CASTRO
The Hon. EDWARD B. HUNTINGTON
The Hon. THOMAS ASHWORTH III
[SDSC # D 270609]

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Attorneys for JEROME ZAMOS
PETITIONER/APPELLANT IN PRO PER

UNRESOLVED ISSUE OF LAW RAISED BY PETITION

Under what circumstances may an APPELLANT be denied the right to have the benefits he or she lost as a result of a trial court order, restored following the reversal of the trial court order which caused those benefits to be lost?

## PETITION FOR WRIT OF MANDATE OR IN THE ALTERNATIVE WRIT OF REVIEW

COMES NOW PETITIONER JEROME ZAMOS [hereinafter referred to as PETITIONER/APPELLANT] and petitions this Court for the issuance of either a writ of mandate to THE COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT DIVISION ONE [hereinafter referred to as "RESPONDENT COURT OF APPEAL"] to:

1. Reinstate the Appeal in Appeal No. D036239 [from a judgment entered on June 27, 2000 (hereinafter referred to as "THE JUNE 2000 JUDGMENT) in favor of REAL PARTY IN INTEREST PATRICIA KAY ZAMOS (hereinafter referred to as "REAL PARTY/APPELLEE") in the Superior Court of the State of California for the County of San Diego (hereinafter referred to as "THE FAMILY LAW COURT")]: and

2. Direct all parties to complete briefing and schedule and hold oral arguments under the provisions of Rules 16, 17 and 21 of the California Rules of Court.

In the alternative PETITIONER/APPELLANT requests that this Court review the order entered by RESPONDENT COURT OF APPEAL on October 4, 2001 [a copy of which is attached hereto as EXHIBIT "1"] which denied his motion to reinstate his appeal from THE JUNE 2000 JUDGMENT which was dismissed on February 21, 2001 [see EXHIBIT "2" attached hereto, the docket record attached hereto as EXHIBIT "3" and PETITIONER/APPELLANT'S (S-096292)] based solely upon PETITIONER/APPELLANT'S failure to comply with an order entered in THE FAMILY LAW COURT on December 14, 2000 [hereinafter referred to as "THE DECEMBER 14TH ORDER] which has now been reversed [see disposition record attached hereto as EXHIBIT "4"].

In support of his petition for relief from this Court PETITIONER/APPELLANT alleges as follows:

1. PETITIONER/APPELLANT'S marriage to REAL PARTY/APPELLEE was terminated pursuant to the terms of an interlocutory decree entered in the Superior Court of the State of California for the County of Santa Barbara

on April 27, 1982 [hereinafter referred to as "THE 1982 DECREE"].

2. On March 23, 2000 REAL PARTY/APPELLEE commenced a proceeding [hereinafter referred to as "THE 2000 PROCEEDINGS"] in THE FAMILY LAW COURT in which she claimed that PETITIONER/PETITIONER/APPELLANT was in default under the terms of THE 1982 DECREE as a result of his alleged failure to satisfy certain non-support obligations to her prior to April 30, 1992.

3. PETITIONER/APPELLANT contested [and continues to contest] the claims made by REAL PARTY/APPELLEE in THE 2000 PROCEEDINGS based upon his claim that he had satisfied all of his obligations to her and his children [all of whom had passed the age of majority by April 20, 1989] prior to April 30, 1992 [the last date he was obligated to make support payments to REAL PARTY/APPELLEE under the terms of THE 1982 DECREE].

4. Although PETITIONER/APPELLANT was able to reconstruct and produce some of the records which supported his defenses to REAL PARTY/APPELLEE'S claims in THE 2000 PROCEEDING, many of his records had been damaged following the 1994 Northridge Earthquake and disposed of in 1998 based upon an unchallenged belief that he had no further obligations to REAL PARTY/APPELLEE or his adult children after the last payment made during April of 1992 and the lack of any legal requirement to maintain such records for a period in excess of six (6) years under federal tax laws.

5. Notwithstanding the period of time which had passed between his last payment to REAL PARTY/

APPELLEE in April of 1992 and the commencement of THE 2000 PROCEEDINGS on March 23, 2000, or any law which required him to maintain records of all of the payments he claimed to have made prior to April of 1992 for a period in excess of six (6) years, on June 27, 2000 THE FAMILY LAW COURT held [without citing any authority for the proposition] that because he was a lawyer who should have maintained records of all of his financial dealings with REAL PARTY/APPELLEE which occurred prior to April of 1992 and was therefore not to be believed or granted the benefit of a laches defense in seeking to defend himself against the improper enforcement of penalty provisions in THE 1982 DECREE, which was delayed until years after he had lawfully disposed of all records of his performance under its terms.

6. Based upon THE FAMILY LAW COURT'S determination that PETITIONER/PETITIONER/APPELLANT had an obligation to maintain records of payments he claimed to have made over ten (10) years earlier and its rejection of his laches defense the court entered THE JUNE 2000 JUDGMENT which imposed an unwarranted penalty of over one hundred and forty thousand dollars [$140,000.00] against him based upon a determination that he had failed to make payments which were allegedly due to REAL PARTY/APPELLEE in 1983 and 1984 under the provisions of THE 1982 DECREE.

7. As set forth in the docket record, attached hereto as EXHIBIT "3" PETITIONER/APPELLANT perfected his appeal from THE JUNE 2000 JUDGMENT by filing:

(i) A notice of appeal on July 19, 2000 in accordance with Code of Civil Procedure §§ 901 et

seq. and Rules 1 through 5 of the California Rules of Court; and

(ii) An opening brief on October 10, 2000 in accordance with Rule 16(a) of the California Rules of Court.

8. Thereafter, and on or about February 21, 2001 [despite PETITIONER/APPELLANT'S compliance with all rules established by either the legislature or the Judicial Council] RESPONDENT COURT OF APPEAL entered an order dismissing PETITIONER/APPELLANT'S appeal based solely and exclusively on his failure to comply with THE DECEMBER 14, 2000 ORDER which has now been reversed and rendered a nullity under the laws of the state of California [see Dismissal Order attached as EXHIBIT "2", the Docket Record Exhibit "3" and the Disposition Record Exhibit "4"].

9. On May 16, 2001 this court denied PETITIONER/APPELLANT'S petition for review of RESPONDENT COURT OF APPEAL'S order dismissing the fully perfected appeal from THE JUNE 2000 JUDGMENT [S 096292].

10. On October 1, 2001 the United States Supreme Court denied PETITIONER/APPELLANT'S petition for writ of certiorari from RESPONDENT COURT OF APPEAL'S order dismissing the fully perfected appeal from THE JUNE 2000 JUDGMENT.

11. As set forth on the disposition record attached hereto as EXHIBIT "4" on October 4, 2001 RESPONDENT COURT OF APPEAL "reversed in full" the DECEMBER

14TH ORDER which was the exclusive basis for the February 21, 2001 dismissal of PETITIONER/APPELLANT'S fully perfected appeal from the JUNE 2000 JUDGMENT.

12. Under the provisions of Code of Civil Procedure § 908 and its inherent judicial and equitable powers RESPONDENT COURT has jurisdiction to restore parties to the same status they occupied prior to entry of an order which is subsequently reversed on appeal.

13. Prior to the entry of THE DECEMBER 14, 2000 ORDER [which has now been reversed] PETITIONER/APPELLANT was entitled, as a matter of right under Code of Civil Procedure § 902 and Article VI § 14 of the Constitution of the State of California, to have his perfected appeal from THE JUNE 2000 JUDGMENT decided on its merits and the denial of those rights after the reversal of THE DECEMBER 14TH 2000 ORDER violates his right to equal protection under both Article I § 7(a) of the Constitution of the State of California and The Fourteenth Amendment [clause 1] of the Constitution of the United States of America.

14. The continued denial of PETITIONER/APPELLANT'S appellate rights in connection with THE JUNE 2000 JUDGMENT following the reversal of THE DECEMBER 14, 2000 ORDER is inherently inequitable because it imposes a draconian penalty against him based solely and exclusively upon his failure to comply with an order which has now been rendered void and unenforceable under the laws of the State of California.

15. Based upon the foregoing, on November 14, 2001 PETITIONER/APPELLANT delivered by Federal Express a motion to reinstate his appeal from the JUNE

2000 ORDER and request to require REAL PARTY/APPELLEE to file a RESPONDENT'S BRIEF in accordance with Rule 16 and 17 of the California Rules of Court [hereinafter referred to "PETITIONER'S REINSTATEMENT MOTION"] to the office of the clerk of RESPONDENT COURT OF APPEAL.

16. PETITIONER/APPELLEE is informed and based upon such information believes that thereafter, and on or about November 15, 2001 the clerk of RESPONDENT COURT docketed PETITIONER'S REINSTATEMENT MOTION and directed REAL PARTY/APPELLEE to file her opposition to said motion on or before November 28, 2000 as more fully set forth on EXHIBIT "3" attached hereto.

17. PETITIONER/APPELLEE is informed and based upon the information which is contained in the docket record attached hereto as EXHIBIT "3" believes that on or about November 28, 2000 REAL PARTY/APPELLEE filed and served her opposition to PETITIONER'S REINSTATEMENT MOTION by mail addressed to his office in Woodland Hills, California.

18. In REAL PARTY/APPELLEE'S opposition to PETITIONER'S REINSTATEMENT MOTION she argued:

(i) RESPONDENT COURT OF APPEAL lacked the jurisdiction to grant the relief requested; and

(ii) PETITIONER/APPELLANT should be grateful and satisfied following the reversal of THE DECEMBER 14TH 2000 ORDER because [despite his continuing obligation to pay REAL PARTY/APPELLEE what has now become a penalty of over one hundred and fifty thousand

dollars ($150,000) under THE JUNE 2000 JUDGMENT] he had been relieved of the additional obligation to pay her attorneys even more money.

19. Immediately following receipt of REAL PARTY/APPELLEE'S opposition to PETITIONER'S REINSTATEMENT MOTION at his Woodland Hills, California office PETITIONER/APPELLANT prepared for filing and service a reply memorandum [hereinafter PETITIONER/APPELLANT'S REPLY] which he thereafter caused to be deposited in the United States Mail for service on REAL PARTY/APPELLEE'S counsel and delivered to a Federal Express Agent in Woodland Hills, California for overnight delivery to RESPONDENT COURT OF APPEAL as more fully set forth on the tracking record attached hereto as EXHIBIT "5".

20. Based upon the tracking record attached hereto as EXHIBIT "5" and the docket record attached hereto as EXHIBIT "3" PETITIONER/RESPONDENT is informed and based upon such information believes RESPONDENT COURT OF APPEAL failed and refused to either file, docket or consider the contents of PETITIONER/APPELLANT'S REPLY following its delivery and acceptance by a member of its clerk's staff at 10:27 am on the Morning of December 3, 2001.

21. Based upon PETITIONER/APPELLANT'S active monitoring of RESPONDENT COURT OF APPEAL'S web site throughout the entire business day on December 3rd and 4th, 2001, PETITIONER/APPELLANT is informed and believes that at sometime during the afternoon of December 3, 2001 [without considering the contents of PETITIONER/APPELLANT'S REPLY] RESPONDENT

COURT OF APPEAL issued the order denying PETITIONER REINSTATEMENT MOTION as more fully set forth on EXHIBIT "1" attached hereto.

22. In denying PETITIONER'S REINSTATEMENT MOTION RESPONDENT COURT OF APPEAL acted arbitrarily without considering the inherently inequitable impact of its action and in refusing to even file or docket PETITIONER/APPELLANT'S REPLY exhibited a level of prejudice and bias which warrants the reassignment of the appeal from THE JUNE 2000 JUDGMENT pursuant to Code of Civil Procedure § 170.1 (6)(C), Article VI § 12 of the Constitution of the State of California and Rule 20(a) of the California Rules of Court.

23. PETITIONER has no other remedies in the ordinary course of law in the absence of this court's exercise of its inherent equitable powers and statutory authority under Code of Civil Procedure § 908, Article VI § 12 of the Constitution of the State of California and Rule 20(a) of the California Rules of Court.

WHEREFORE PETITIONER/APPELLANT prays that this Court enter an order either:

1. Directing RESPONDENT COURT OF APPEAL for the Fourth Appellate District Division One to enter an order based upon its inherent equitable and statutory jurisdiction under code of Civil Procedure § 908 reinstating PLAINTIFF/PETITIONER/APPELLANT'S appeal from THE JUNE 2000 JUDGMENT and directing REAL PARTY/APPELLEE to file her RESPONDENT'S brief within thirty (30) days following reinstatement of said appeal;

2. Upon reinstatement of PLAINTIFF/PETITIONER/APPELLANT'S appeal from THE JUNE 2000 JUDGMENT issue an order reassigning all matters related to said appeal [including any collateral enforcement proceedings which may be pending] to an appellate panel other than RESPONDENT COURT OF APPEAL for the Fourth Appellate District Division One for final resolution and the issuance of a decision on the merits in accordance with the provisions of Article VI § 14 of the Constitution of the State of California.

3. In the alternative issue a writ of review from the order denying PETITIONER'S REINSTATEMENT motion and following a hearing thereon enter an order directing the reinstatement of PETITIONER/APPELLANT'S appeal from THE JUNE 2000 JUDGMENT.

4. For costs of suit incurred herein.

5. For such other and further relief as the Court deems just and proper.

LAW OFFICES OF JEROME ZAMOS

By /s/ Jerome Zamos
JEROME ZAMOS,
Attorneys for
PETITIONER/APPELLANT
JEROME ZAMOS IN PRO PER